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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

MAXIMILIAN KLEIN, et al.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. C 20-08570-JD
)	
META PLATFORMS, INC., formerly)	
known as Facebook, Inc.,)	
)	
Defendant.)	
_____)	

San Francisco, California
Thursday, August 11, 2022

TRANSCRIPT OF PROCEEDINGS

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Thursday - August 11, 2022

11:50 a.m.

P R O C E E D I N G S

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THE CLERK: Calling Civil 20-8570, Klein versus Meta Platforms.

THE COURT: Okay.

THE CLERK: Counsel, please state your appearances for the record.

(No response.)

THE CLERK: Somebody?

MS. MEHTA: Good morning, Your Honor. Sonal Mehta on behalf of the defendant Meta Platforms, Inc. With me is my colleague David Gringer, and in-house counsel from Meta, Eric Meiring.

THE COURT: Okay.

MR. SWEDLOW: Good morning, Your Honor. Steven Swedlow on behalf of Plaintiff Klein and putative class.

I think I'll just let you introduce yourself, if that's okay.

THE COURT: Sure.

MR. BATHAEE: Good afternoon, Your Honor. Yavar Bathaee of Bathaee Dunne LLP on behalf of the advertiser class.

THE COURT: That's Klein; right?

MR. BATHAEE: Yes, Your Honor.

1 **THE COURT:** Okay. All right.

2 **MR. BATHAEE:** I'm with -- I'm sorry.

3 Go ahead, Brian.

4 **MR. DUNNE:** Brian Dunne of Bathaee Dunne LLP on behalf
5 of the advertiser putative class in Klein as well.

6 **MR. TERUYA:** Kevin Teruya from Quinn Emanuel for the
7 consumer class. Good morning, Your Honor.

8 **MR. PEPPERMAN:** Good morning, Your Honor. Brantley
9 Pepperman from Quinn Emanuel for the putative consumer class.

10 **THE COURT:** All right.

11 **MS. LAWRENCE:** Amanda Lawrence from Scott & Scott in
12 the Klein matter on behalf of the advertising class, please.

13 **THE COURT:** More?

14 **MR. VERRIER:** Keith Verrier from Levin Sedran and
15 Berman on behalf of the advertiser class.

16 **THE COURT:** Okay. Good.

17 Who is going to take the lead on the plaintiffs' side for
18 the --

19 **MR. SWEDLOW:** I was going to, but I didn't know if you
20 want to --

21 (Reporter interrupts for clarification of the record.)

22 **THE COURT:** Well, I just had a couple of questions
23 about the motion to dismiss. Yeah.

24 **MR. SWEDLOW:** Okay.

25 **MR. BATHAEE:** Good morning, Your Honor --

1 **THE COURT:** Let me ask you -- we're just talking about
2 the advertisers here now. The consumers are, I guess, already
3 off to the races.

4 What is -- I'm having trouble understanding, for the
5 advertisers, what the relevant market is for the Section 2
6 claims.

7 **MR. BATHAEE:** Your Honor, the relevant market is the
8 social data market. It's -- oh, I'm sorry. Sorry. Social
9 advertising market.

10 **THE COURT:** I almost fell out of my chair. I thought
11 that was --

12 **MR. BATHAEE:** I'm sorry.

13 **THE COURT:** This is why I'm asking.

14 **MR. BATHAEE:** I'm sorry.

15 **THE COURT:** That's all right.

16 **MR. BATHAEE:** It's the social advertising market and
17 there's a social data targeting barrier to entry surrounding
18 it.

19 **THE COURT:** And I hear the words. I don't understand
20 the market.

21 So who is in the social advertising market? Who are
22 the -- who are the players?

23 **MR. BATHAEE:** Your Honor, we identify LinkedIn, for
24 example; Twitter. These are members of the submarket from the
25 general online advertising market.

1 **THE COURT:** All right. But, as I understand -- and
2 you need to jump in because your complaint is like a novel. It
3 goes on. I'm not necessarily criticizing it. It is a little
4 overlong. I am it criticizing it.

5 I just -- I'm having trouble understanding -- I know
6 Section 2 fairly well -- it's one of my favorite areas -- and
7 I'm having a hard time understanding the relevant product
8 market. It looks to me like you're dangerously close to saying
9 the relevant product market is Facebook.

10 I'm going to say a Facebook because I'm old and I'm having
11 trouble adjusting to Meta, but you understand what I'm saying.

12 **MR. BATHAEE:** I do.

13 **THE COURT:** So I don't really get it.

14 And then there's the weirdness of also you come very close
15 to saying it's Facebook, that's the relevant market; which is a
16 doubtful proposition to my mind. I'm not saying it's the end
17 of the world. I'm just going to need some explaining. But you
18 also make the strange -- after that premise, the strange
19 statement that Facebook has only an 83 percent share of its own
20 market.

21 So help me out. Because this is a critical fact,
22 you know, whether you're going to go ahead or not, in order to
23 monopolize, you have to have a relevant product market. I
24 don't care about the U.S. right now; that may come into play
25 later. So don't worry about geography. I'm just talking about

1 the product.

2 So I don't understand how you're defining that market. It
3 doesn't look like a market that I've seen defined by the usual
4 standards which is, you know, interchangeable products, and
5 here are the competitors, and other factors. So spell it out
6 for me.

7 **MR. BATHAEE:** Well, Your Honor, it's not a Facebook
8 market. We have Twitter, Snapchat, TikTok -- TikTok has
9 entered much later, since 2020. These are all competing for a
10 special kind of advertising, and that's the kind that targets
11 advertising based on information exchanged between users, and
12 information that allows propagation of content.

13 So it's a very distinct submarket of the general
14 advertising market. And as Judge Koh recognized in the first
15 motion to dismiss, it has been thoroughly pled, and market
16 power has been pled.

17 **THE COURT:** Koh is not here anymore. You've got me.

18 **MR. BATHAEE:** I understand.

19 **THE COURT:** It would be a lot better to address my
20 concerns.

21 **MR. BATHAEE:** Of course, Your Honor.

22 **THE COURT:** Here's where I'm getting hung up. I mean,
23 I don't -- everybody on the online industry has been using
24 targeted ads from day one. That's how they monetize their
25 products. That's why people don't have to pay for anything.

1 So I just -- it's not at all clear to me how you're
2 defining the handful of people in the relevant product
3 marketing to be YouTube, Twitter, Facebook, and TikTok.

4 I'm also -- just as a side thought, I mean, it's hard to
5 see that there are any meaningful barriers of entry when TikTok
6 has come on the scene and had such a significant impact on
7 eating up Facebook's market share. That doesn't suggest that
8 they're a particularly good monopolist if they're not able to
9 exclude competition; which is the definition of a monopolist.
10 And everybody else in the world has used this targeted
11 advertising from day one of the Internet. That's a little bit
12 of an exaggeration, but not much.

13 So I'm not seeing it.

14 **MR. BATHAEE:** Well, Your Honor, you're right that
15 there is targeted advertising. But what the difference is
16 between social advertising is it uses a specific kind of data.
17 Now, I can distinguish it, I mean, by looking at Google, for
18 example. When you enter a search -- right? -- when you talk
19 about a search, someone gives you a query and that query is
20 used to target advertising. Social advertising is
21 context-based. It's about people interacting with each other
22 and content propagating. You don't have -- you don't have
23 something like a query where you know exactly what the user
24 wants.

25 And, in fact, our complaint makes this very point.

1 You have a funnel. Google's way close to the point of --
2 the point of conversion, as they call it. Facebook is not.
3 Facebook is way up here and needs much more data and very
4 specific data to target its advertising.

5 Now, as for TikTok, during the most of our monopolization
6 period -- and I think our claims pretty much stops around
7 2020 -- there is a significant barrier to entry. And TikTok
8 got past it exactly how we say you need to, and that is through
9 a critical mass of social data.

10 And if you don't have it, you're not going to get past it.
11 And TikTok is very well funded. Extremely well funded. And --

12 **THE COURT:** Let me -- if I might just jump in.

13 I just don't understand why that's a market in the
14 antitrust sense. Okay? So Facebook has to do a little more
15 sleuthing to figure out that 10 photos of a user on a golf
16 course indicates that she likes to golf. Okay. I get that.

17 Whereas, if you're on Google and the user types in
18 "women's golf clubs," you know right away that's the issue.

19 But why, I don't see why that's -- I mean, everybody is
20 doing it, maybe in slightly different ways, but they're still
21 an advertiser. Your clients are still bargaining with all of
22 those entities to reach the audience. Some have more direct,
23 like Google. Some are more reading tea leaves, as you say,
24 from Facebook's end. But they're all in the market.

25 And if you do that, I mean, isn't -- doesn't Facebook's

1 share of the market drop well below 50 percent?

2 **MR. BATHAEE:** Well, Your Honor, the important point
3 for a defined market is cross-elasticity of demand; the fact
4 that products are interchangeable. And we pled significant
5 facts that they are not interchangeable. An advertiser that
6 advertises on Google has completely different criteria,
7 completely different expectations, completely different breadth
8 than someone who advertises, for example, on the social media
9 platform. And that's because the level of targeting is
10 extremely different. You can target by age, by demographic, by
11 content exchanged, by interest; and you can't do that generally
12 with Google, with a Google search.

13 And, Your Honor, the *Brown Shoe* factors, I think one of
14 them is: Does -- do people generally consider these different?

15 And we've pled tons of facts that this is completely
16 viewed as a different kind of product. They're not
17 interchangeable. If -- and we plead as much because it is one
18 thing to enter something into a search term, buying a search a
19 term, targeting ads that way. And it's another thing to pick
20 exactly the kind of people you want to see that ad with
21 specificity. They're not interchangeable products.

22 Now, they become sort of interchangeable by 20- -- by
23 2019, when the Jedi Blue agreement kicks in. And that's
24 exactly why they cut that deal.

25 **THE COURT:** What happens in 2019?

1 **MR. BATHAEE:** The Jedi Blue agreement in 2018 --

2 **THE COURT:** Jedi, J-E-D-I?

3 **MR. BATHAEE:** That's right, Your Honor.

4 That's an agreement between Google and Facebook --

5 **THE COURT:** Oh, that.

6 **MR. BATHAEE:** -- to divide markets, essentially. And
7 that's because the markets were starting to converge.

8 **THE COURT:** That's the Section 1 claim; right?

9 **MR. BATHAEE:** That's also a Section 2 claim, Your
10 Honor. It's an agreement that's --

11 **THE COURT:** Okay. Before we get too far down -- I
12 understand what you're saying.

13 What about TikTok? I mean, it seems like a pretty porous
14 barrier to entry if this upstart can come out of nowhere --
15 which it literally did -- and turned out to be the product that
16 everybody under the age of 25 wants to be on.

17 **MR. BATHAEE:** Well, they traversed the barrier to
18 entry in precisely the way the complaint says, AI and
19 targeting. That's very expensive. That's not something you
20 can do. For example -- and we say this in the complaint -- to
21 train a large language model, for example, you have to spend
22 tens or hundreds of millions of dollars in GPU and computing
23 time. There are very few people that can pull that off; and
24 TikTok did in 2020 and they were heavily bankrolled to do it.

25 And there is a distinction between use and uses and ad

1 money. And that's the important point. It's not -- it's not
2 necessarily that TikTok, its uses may be interchangeable, but
3 it's -- sorry. Its uses may not be interchangeable, but the ad
4 money may be. And we're talking about product market. So
5 TikTok, you slide through videos and it learns exactly what you
6 want and what you are interested in. That's not -- that is not
7 what Facebook did for many years.

8 **THE COURT:** I'm not -- listen. I don't use social
9 media -- as a principled matter -- because I'm a federal judge;
10 but I have seen TikTok. And I don't think -- TikTok is a lot
11 closer to Facebook than Google in terms of the information that
12 people are posting.

13 And it may have been expensive. It may have been
14 back-breaking labor; I don't know. The fact is, a major
15 competitor entered this market at a time when you-all are
16 saying in the complaint that Facebook had dug a moat around the
17 castle. And I just -- it's hard to see how the barriers to
18 entry are plausible when you have these kinds of things
19 happening.

20 **MR. BATHAEE:** Well, Your Honor, TikTok comes way later
21 than most of our allegations. In fact, our allegations stop
22 before TikTok's entry. It's very different than the consumer
23 case, I think, that may be all the way through. The advertiser
24 case stops before TikTok enters because the exclusionary acts
25 stop.

1 Now, is the barrier to entry same in 2020 as it was in
2 2018 or 2019? It's very different. And in 2017 or 2016, for
3 example, when, for example, Google bought DeepMind, and there
4 is this AI revolution, that's a very -- that's a much more
5 powerful barrier to entry because you have feedback loops. You
6 have network effects that are on steroids by then. And it gets
7 worse and worse by '17, '18, '19; which is exactly why in 2018,
8 Facebook had to cut that deal with Google.

9 Google had far more sophisticated artificial intelligence
10 and machine learning. They couldn't keep up anymore. And so
11 the barrier to entry, by the time TikTok enters, is a very
12 heavy AI one. And earlier, it's not heavily AI. And it is a
13 very different barrier to entry and -- by the time TikTok
14 enters. And by then, our exclusionary acts essentially end.

15 We're talking about -- we're talking about the four years
16 between -- before 2020, before 2019. And there it is
17 actually -- you can -- we pled facts that no one could traverse
18 that barrier to entry and, in fact, Google+ tried.

19 **THE COURT:** In your view, Meta's monopoly power ended
20 in 2019.

21 **MR. BATHAEE:** Your Honor, it may well have. We don't
22 know. And that is a completely fact-based question. And by
23 2020 -- by 2020, we were looking at completely different things
24 driving --

25 **THE COURT:** What happened to Meta?

1 I want to hear from Ms. Mehta in just a moment.

2 But what -- what happened to Facebook's pricing after
3 TikTok erupted?

4 **MR. BATHAEE:** Our complaint doesn't cover that because
5 our claims don't cover that point.

6 But we can -- we do cover, during our relevant period,
7 prices going up almost exponentially. There's a graph in the
8 complaint showing that. And the fact that they can raise
9 prices and no one can do a thing about it is direct evidence of
10 the barrier to entry.

11 And, in fact, Your Honor, the fact that they cut a deal
12 with Google when the markets started to converge is also
13 evidence of that barrier to entry and that submarket. And
14 the -- these two points, Your Honor, are highly factual points,
15 and we plead them in complete detail.

16 Now, maybe Facebook comes back and says: Look, TikTok
17 destroyed our monopoly in 2020.

18 Well, they need to prove that and they need to prove that
19 affects -- that affects the overcharge that occurred during our
20 relevant period, when there was exclusionary conduct targeting
21 the issues -- targeting our clients, the advertisers, what made
22 them pay the higher price.

23 We don't have that issue with TikTok.

24 **THE COURT:** Just -- okay. I mean -- just one last
25 question.

1 Look, you're probably going to be safe just because these
2 are factually intensive. I'm just highly doubtful about a
3 number of these. Who knows. Maybe you're right; I need to see
4 the evidence, probably. But how -- what was the means of
5 excluding competition during those -- what is it 2015 to 2019;
6 who did Facebook exclude from the advertisers?

7 **MR. BATHAEE:** Well, Your Honor, there's several --

8 **THE COURT:** They were the only show in town is
9 basically what I hear you saying. So where else would you
10 spend your advertising dollars but Facebook? That's not
11 exclusionary. That's, in old-fashioned terms, a natural
12 monopoly from a first-mover in the industry.

13 **MR. BATHAEE:** Well, Your Honor, there are several
14 exclusionary acts. In fact, that's the centerpiece of our
15 complaint.

16 They scuttled their own platform to get rid of their
17 competition. But that left them vulnerable, because the way
18 they were getting data to target people and ads was through
19 these people in their platform. So someone would build an app
20 for Facebook's platform, and that would give them data. So
21 what did they do? They entered data-sharing agreements with
22 all of these people; and they're exclusive. There's not -- as
23 they say, these nonexclusive agreements. They're agreements to
24 use Facebook's APIs, or put ads, pump ads into Facebook in
25 exchange for continued access --

1 **THE COURT:** I saw all that. I'm just at a higher
2 level. How did that exclude a competitor?

3 **MR. BATHAEE:** How does Snapchat compete when it
4 doesn't have enough data to traverse that barrier to entry?
5 They can't do the same targeting as Facebook --

6 **THE COURT:** Probably the same way TikTok did. I mean,
7 Snapchat just chose not to do that.

8 **MR. BATHAEE:** Snapchat didn't do that for years and
9 years. In the same way TikTok did it, why didn't they do it?
10 There's no evidence. TikTok came in with an elephant-like
11 amount of funding, and came into a very different market by
12 2020, one that we are not -- it's not at issue for advertisers.

13 And so if Snap could do it, it would have done it. Snap
14 actually looked so good that Facebook cloned it. Facebook
15 cloned it. It was that powerful and still could not traverse
16 the data targeting barrier to entry.

17 Because it's not just data, Your Honor, it's also the
18 ability to target, and that requires machine learning and
19 requires AI. And no one else could do it without a critical
20 mass of data and a critical mass of technology. And all of
21 this is pleaded with detail in the complaint, including the
22 very particulars of the technology needed and the types of, as
23 we say, signal which is a particular type of social data needed
24 to power that technology. That's not easy to get. Snap didn't
25 have it; Twitter didn't have it; LinkedIn didn't have it.

1 And TikTok eventually pulled it off. And they pulled it
2 off, Your Honor, maybe -- we don't know, and this is factual --
3 in a sort of innovative way; right? In TikTok, you're able to
4 sort of -- they learn from you. They learn from your behavior.
5 They sit there and they look at every video you liked and you
6 just keep swiping. No one else had that.

7 So maybe they innovated into the space. That actually
8 does happen. It happened with Microsoft in 2000. It doesn't
9 mean Microsoft didn't have a monopoly well before then and
10 abused it. It doesn't mean Microsoft didn't unlawfully
11 maintain it for years.

12 We have something similar here. TikTok enters the market
13 in 2020, well after, we argue, the exclusionary conduct ended.
14 We don't argue that TikTok, by then, has much to do with the
15 exclusionary acts of the monopoly maintenance for those prior
16 years. And when TikTok comes in, there are heavy fact issues
17 including: Did TikTok innovate? Did TikTok have massive
18 amounts of funding, data, and AI to traverse the data targeting
19 barrier --

20 **THE COURT:** It may have cost the fortune of Croesus;
21 it doesn't matter. If you can get in, you can get in. That
22 means that there is no monopoly power to exclude competition.

23 But, Ms. Mehta, you have been waiting patiently. I would
24 like to hear your view on the relevant market.

25 **MS. MEHTA:** Yes, Your Honor. Thank you.

1 So you won't be surprised to hear that my view is similar
2 to your view, which is -- or at least the questions --

3 **THE COURT:** Let me just jump in. I'm expressing some
4 tentative thoughts.

5 **MS. MEHTA:** Fair enough. And I agree with that.

6 So -- but I do have some of the same questions you have,
7 and we've presented those questions each time the social
8 advertising market has come up.

9 Judge Freeman had some of the same questions in the *Reveal*
10 *Chat One* opinion in which she pressed on this very issue, in
11 light of *Hicks*; right?

12 And what we are hearing today is precisely the type of
13 contriving of a market that is going to cause fundamental
14 problems in the theory. And I think what you will see here is
15 they've contrived a market, they admit LinkedIn is in the
16 market, they admit Twitter was in the market, Snap, TikTok, and
17 many others --

18 **THE COURT:** What about YouTube; is YouTube in the
19 market?

20 **MS. MEHTA:** I'm sorry?

21 **THE COURT:** Is YouTube in the market?

22 **MS. MEHTA:** I think that's for them to tell us,
23 whether with YouTube is in the market. But I think a large
24 number of people would say YouTube is in the market.

25 I think there is also a question as to whether they would

1 define the market to include Google, which does targeted
2 advertising.

3 **MR. BATHAEE:** No.

4 **MS. MEHTA:** The fact that we don't know, based on an
5 879-paragraph complaint, who is alleged to be in this market
6 and what lines they're drawing -- other than carving in and
7 carving out and changing over time to try to contrive a
8 market -- is a fundamental problem. And I think, if you
9 consider the core of their theory, which is that there was some
10 sort of barrier to entry, the fact that all of these other
11 players have entered the market at different times, really, I
12 think, fundamentally undermines the notion that there's a
13 structural barrier to entry.

14 The fact that Facebook was a strong platform, and
15 performed well because it had a good product, is not
16 anticompetitive. It doesn't mean that -- what they have is a
17 claim based on its success, which is essentially what you hear
18 Mr. Bathaee saying. And I think that problem permeates the
19 actual challenged conduct as well.

20 So if we think about what the core of the theory is even
21 apart from what I would submit would be the failure to plead an
22 adequate market, if you listen to the core of the theory it is:
23 Well, there is a handful of nonexclusive vertical agreements
24 that they claim to be these entry and capture agreements;
25 there's other nonexclusive vertical agreements that they call

1 the data sharing agreements.

2 There's integration of WhatsApp and Instagram. There is
3 this surveillance apparatus that they've described, Onavo. And
4 then there is a Google agreement, which is a basis for their
5 stand-alone Section 1 claim. But affirmatively they elected
6 not to plead a stand-alone Section 2 claim based on the Google
7 agreement. And the reason for that is that Google agreement is
8 about off-platform advertising. It's about off-platform
9 advertising, not --

10 **THE COURT:** Well, I think that you -- that is clearly
11 an issue that's just going to have to be -- I don't have any
12 doubts that the Section 1 claim is going to go forward.

13 **MS. MEHTA:** Agreed, Your Honor.

14 **THE COURT:** And that's my own conclusion, in addition
15 to a prior court. Look, I hear what you're saying. But I
16 think at the end of the day, classically Section 2, relevant
17 market, barriers to entry, exclusionary conduct, or factual
18 issues -- I don't think the complaint is particularly
19 deficient, I'm not saying I have some doubts. But seems to me
20 that it's probably enough to go forward.

21 But, you know, one thing I would like to see as we go
22 forward is, I'd like to get the relevant market issues
23 addressed early rather than later. This is a gatekeeper; okay?
24 Because if there's no relevant market, there is no market in
25 which monopoly power could be exercised.

1 I'm also -- I'm really just a little bit at sea as to what
2 the barriers to entry are and who was excluded. I can't figure
3 out who was kept out of the advertising game. Who wanted to do
4 this service and who, among the plaintiffs' advertisers, wanted
5 to buy a service that they couldn't do because Facebook built a
6 brick wall? Am I just -- I'm not seeing it. So those are the
7 things I'd like to target earlier.

8 On the limitations issues I think there's enough to go
9 forward.

10 Is there anything you want to add on that?

11 **MS. MEHTA:** Yes, Your Honor.

12 **THE COURT:** I mean, it's very new events under
13 *Samsung*. I think it's -- I mean, look, at the end of the day
14 you'll still have the opportunity to raise it as a fact issue,
15 we're still talking about 12(b)(6), but under *Samsung* it seems
16 to me that they have enough.

17 **MS. MEHTA:** Understood, Your Honor.

18 I will respectfully submit that I think on both the merits
19 of their claims in terms of whether they've adequately pled an
20 effect in the social advertising market and an anticompetitive
21 effect in the market, and on statute of limitations, what we
22 heard today actually goes to the heart of the problem, which is
23 they're now saying their claims are about supposed monopoly and
24 anticompetitive effect 2018, 2017. How do they then connect
25 that to a 2022 filing date, which is the filing date for this

1 complaint?

2 **THE COURT:** They've got four-years.

3 **MS. MEHTA:** Well, right. But if it's 2017 and ends in
4 2018, it may fall right outside of the statute of limitations.

5 **THE COURT:** Well, no, no. It's the last -- within
6 four years of the last overt act. That's typically how it's
7 construed.

8 **MS. MEHTA:** Right. Understood. But that would be
9 2018, and I don't know when in 2018 they're claiming the
10 monopoly ended.

11 But the problem with all of this is really what I'm
12 getting as is they have had four opportunities -- I guess,
13 five, if we listen to them today -- to articulate a viable
14 claim, because they've had their original complaint; their
15 consolidated advertiser class action complaint; their first
16 amended complaint; their opposition to the motion to dismiss;
17 and the argument today to articulate a viable market for a
18 viable time period and a theory of exclusionary conduct that
19 would have an anticompetitive effect in that market.

20 **THE COURT:** Just to be clear, I'm not going to cut
21 them off just on the pleadings. This is intensely fact-based.
22 This is a complicated market. It's going to require expert
23 testimony, in addition to a good factual record. I'm not going
24 to turn off the spigot just on the papers. That would be
25 unreasonable, I think.

1 Let me ask you this, though -- because I want to get into
2 discovery. We're going to work out all your discovery
3 problems, get you back on track here.

4 I do hot-tubs. Do you understand what those are? I'm
5 very fond of them.

6 Now what's the -- have you talked about how you're going
7 to -- do you have your experts yet? Do you know more or less
8 who you're going to use and have you shared that with each
9 other?

10 **MR. BATHAEE:** We do, Your Honor. We do.

11 **THE COURT:** You what?

12 **MR. BATHAEE:** We have not shared it, but we have our
13 experts, Your Honor.

14 **THE COURT:** Okay.

15 **MS. MEHTA:** And Your Honor has set a schedule that
16 includes the period for the hot-tubs.

17 **THE COURT:** I really want -- can you tell me now? Do
18 you want -- you don't want to tell -- it's okay. If you don't
19 want to tell me now, it's all right. But can you tell me now
20 who it might be? Do you want to wait?

21 **MR. BATHAEE:** I'm happy to --

22 **THE COURT:** If it's not locked in, that's okay.

23 **MR. BATHAEE:** Yeah.

24 **THE COURT:** Okay.

25 **MR. BATHAEE:** My colleague, Brian Dunne, is going to

1 address that.

2 MR. DUNNE: Yeah. So we have a -- Rick Warren Bolton
3 and Michael Williams is --

4 THE COURT: Oh, Warren Bolton. Okay. And who else?

5 MR. DUNNE: Yes, Warren Bolton, will be our liability
6 expert. And then we have -- Mike Williams is our damages
7 expert.

8 THE COURT: All right. So Warren Bolton is liability
9 and Mr. Williams is damages.

10 MR. DUNNE: And then we have an MLAI expert. I forgot
11 his name.

12 THE COURT: A what?

13 MR. DUNNE: A machine learning AI expert to actually
14 help --

15 THE COURT: Okay. I'm just talking about the
16 antitrust thing.

17 MR. DUNNE: Your Honor, that will go to the barrier to
18 entry stuff --

19 THE COURT: And, Meta, have you all settled on your
20 experts yet?

21 MS. MEHTA: At least some of them, Your Honor. So we
22 will be working with Dennis Carlton, Katherine Tucker, and I
23 suspect some others depending on how the issues develop.

24 THE COURT: Okay. On liability issues.

25 MS. MEHTA: Yes, on liability issues.

1 **THE COURT:** It's likely to be Carlton and Warren
2 Bolton at the hot-tub then; right? I'm not -- your hands
3 aren't tied. If anything happens, it's fine.

4 I would rather do it sooner rather than later. Here's
5 what I would like to do, I think. In addition to my fondness
6 for hot-tubs, I am very fond, in my patent cases, of tutorials.
7 And I think a market tutorial, relevant market tutorial with
8 some thought about barriers to entry, exclusionary conduct,
9 would be useful as well. So think about doing a tutorial day.

10 It would be off the record. Tutorials, I do my IP
11 tutorials, patent tutorials off -- actually, I do do them on
12 the record, but you just can't cite them.

13 Just think about that. Okay? I think I'm probably going
14 to do to this in my Google antitrust case, although they don't
15 know it yet. Just think about how that might work.

16 **MS. MEHTA:** Your Honor, just one point --

17 **THE COURT:** Do you understand what I'm saying? This
18 would be each expert would come in and say: Here's my
19 understanding of what the market is; here's my understanding of
20 what Meta has done; here's my understanding about why it
21 excluded people who wanted to get in, and -- or vice versa.
22 Yeah.

23 **MS. MEHTA:** Understood, Your Honor. And just one
24 point of clarification. I assume you also want to do this for
25 the users, because I think some of the very same issues apply

1 to their market definition that you've raised with respect to
2 the social advertising maternal.

3 **THE COURT:** Consumers?

4 **MS. MEHTA:** Users, consumers, we use those therms
5 interchangeably.

6 **THE COURT:** Yeah, for everybody. Yeah. Yeah. I
7 mean, we haven't had -- I haven't been called upon to look at
8 that one yet so I don't --

9 **MS. MEHTA:** And, Your Honor, I may have missed it, but
10 I don't know that we've heard who the users plan to use for
11 expert purposes.

12 **THE COURT:** Oh. Aren't you all using the same people?

13 **MR. SWEDLOW:** No, we're not. We're not defining the
14 same market and we don't have the same theories. So...~..~

15 **THE COURT:** Oh.

16 **MR. SWEDLOW:** I wasn't prepared to tell you because we
17 haven't finalized who we're going to use as our experts. But
18 since everybody else shared, can we set a very short deadline
19 and then we'll send Facebook an e-mail or letter saying here
20 are the experts we're going to use.

21 **THE COURT:** I have had no occasion to look at the user
22 complaint because it wasn't -- you know, nothing came up. So I
23 don't know anything about it, to be honest. And I would really
24 prefer not to have overlapping plaintiffs' side experts. So
25 just see what you can do with that. Okay?

1 If you have Section 2 claims -- do you have Section 2
2 claims for the users? Yes?

3 MR. SWEDLOW: Yes. I was just -- we're not going to
4 have overlapping experts. We have --

5 THE COURT: In other words, I don't want Warren Bolton
6 to be followed by someone, technically on the user side, saying
7 exactly the same thing with a few extra points.

8 MR. SWEDLOW: We have different -- I don't want to
9 take up your entire afternoon --

10 THE COURT: You have very different markets and
11 everything else? How is this going to work for trial then?
12 How are we going to try this?

13 MS. MEHTA: Your Honor, we did raise this issue with
14 Judge Koh at the initial hearing with respect to counsel
15 selection.

16 Our view is that the cases should not be consolidated in
17 the way they have been for that reason. But Judge Koh thought
18 it made sense to consolidate them. I think we're now pretty
19 far down the line in terms of consolidated discovery.

20 THE COURT: I think that's okay. I'm just talking
21 about trial.

22 MS. MEHTA: But at trial I think we are going to have
23 some real serious conversations depending on what theories
24 survive this process. And if we get to trial, then the
25 question will be how do we structure that. And I think there

1 is still a lot of work to do to figure out -- I mean, from our
2 perspective, I think a lot of the theories are nonviable and
3 we're going to have to hash that out with Your Honor over the
4 next year.

5 **THE COURT:** I am not surprised to hear you say that.

6 **MS. MEHTA:** I know you're not.

7 **MR. SWEDLOW:** Your Honor, I don't know what's
8 happening here, but Facebook argued that they should be
9 consolidated and included in one complaint. We don't believe
10 they should be consolidated. They're different classes and
11 different theories. So I don't know why we're now saying that
12 Facebook didn't want it to be consolidated. They did; we
13 didn't. So I still think it shouldn't and it sounds like we're
14 in agreement that it should not be consolidated --

15 **THE COURT:** I asked an innocent which is: How are we
16 going to try the cases?

17 Well, apparently, there is some huge back story. I'll
18 deal with it later.

19 Let's deal with the discovery now.

20 **MS. MEHTA:** Your Honor, there is just one point of
21 clarification with respect to the pleadings in light of what
22 I -- where I read Your Honor to be on the motion to dismiss
23 which is: In -- over the course of the motion to dismiss
24 briefing, the plaintiff -- the advertiser plaintiffs have
25 indicated that they're withdrawing a large number of the

1 theories and allegations from their complaint. It is 879
2 paragraphs, as Your Honor knows.

3 What we would ask is if you are going to deny the motion
4 to dismiss, that you direct them to file an amended complaint
5 that conforms to only the theories that they have not abandoned
6 and the allegations that actually relate to those theories, not
7 hundreds of paragraphs of context.

8 The reason for that is twofold. One, it's very burdensome
9 for us to respond to a complaint of this length. But two --
10 and perhaps more importantly -- I don't think Your Honor wants
11 us to have discovery skirmishes based on allegations in the
12 complaint and whether things are actually relevant or no longer
13 relevant. And so cleaning up the pleadings will allow us to
14 actually focus on the case as we go forward.

15 So that would be our request.

16 **MR. BATHAEE:** Your Honor, if I may respond, the --
17 what she is referring to -- what my friend over here is
18 referring to is the original refusal deal claim.

19 Now, the problem, of course, the refusal deal is not in
20 this case, but the context for the exclusionary agreements is
21 the same, which is that Facebook demanded reciprocity
22 agreements, hatched the scuttling of its platform, which in
23 turn required it to enter into these exclusionary agreements.
24 They're part and parcel in that sense that we're not basing
25 liability on those facts, but those facts are extremely

1 important for the plausibility of the complaint, and even
2 potentially at trial.

3 And, Your Honor, I -- if Your Honor will permit me, I just
4 do want to make some point on limitations if you don't mind.
5 And that is --

6 **THE COURT:** Okay. Yeah.

7 **MR. BATHAEE:** Ms. Mehta -- I just want to correct
8 this. Ms. Mehta said that this starts in 2017 for the eBay and
9 Netflix agreement. And for Netflix it's incorrect, and
10 Your Honor can look at the sealed portions of paragraphs 530
11 and 536 -- I won't read the date because it's sealed.

12 **THE COURT:** You know, I had a question about that, but
13 go ahead.

14 **MR. BATHAEE:** Your Honor, so there is no relation back
15 or statute of limitations issue with respect to Netflix.

16 With respect to eBay, the conduct spans from 2017, all the
17 way to 2019. And, in fact, Your Honor, we identified -- we
18 identified a presentation in this on paragraph 469 --

19 **THE COURT:** You know, actually, I think I'm okay on
20 all this. My question --

21 **MR. BATHAEE:** Okay.

22 **THE COURT:** -- why is this complaint under seal? I
23 mean, I didn't --

24 **MR. BATHAEE:** Your Honor --

25 **THE COURT:** I am really hostile to sealing documents

1 because it completely undermines who we are as a federal court,
2 which is a courtroom of the People of the United States, who
3 have a perfect right to see everything that crosses my desk and
4 that I rely upon and a jury will rely upon in making a
5 decision, particularly in a case of this magnitude. And I'm
6 particularly doubtful that complaints should be sealed.

7 So why was this sealed?

8 **MR. BATHAEE:** Your Honor, we took no position on the
9 sealing. These are Facebook's redactions, essentially, that
10 they wanted. We don't actually see reasons any of these things
11 should be sealed, but that's a question for Facebook, Your
12 Honor, and we don't oppose unsealing.

13 **THE COURT:** I'm not just following it, Ms. Mehta.

14 **MS. MEHTA:** Yes, Your Honor. I understand
15 Your Honor's view on that and I understand the case law on that
16 issue. We have proposed very, very, very limited and narrow
17 targeting of the redactions. This is at Docket Entry
18 Number 244 --

19 **THE COURT:** This is -- I'm holding up -- which will
20 not show up on the record -- the entire page after page after
21 page is redacted. That is not narrow and limited.

22 **MS. MEHTA:** That's not the set of redactions that we
23 actually asked to have sealed.

24 So they submitted a highlighted copy of the complaint
25 which was based on the confidentiality designation of the

1 documents they were citing. Then, under the local rules, we
2 submitted a declaration from a Meta employee with targeted,
3 narrowed requests to seal only the specific things that would
4 create, under the relevant standards, undue burden to Meta's
5 business.

6 And that's the declaration at 244-1. And it is not all of
7 the highlighting. It is a very limited subset of that.

8 **THE COURT:** It's not. It's a much smaller set?

9 **MS. MEHTA:** Yes, Your Honor. And we have a
10 declaration --

11 **THE COURT:** If I look at this, I would say it is a
12 fraction of what I have now?

13 **MS. MEHTA:** Yes, Your Honor. We narrowed
14 significantly what needs to be sealed from the highlighted
15 version of the complaint that was filed by the --

16 **THE COURT:** All right. I'll take a look at it, but in
17 all probability a much, much less redacted complaint will be
18 filed. Okay?

19 **MR. BATHAEE:** Your Honor, I just want to flag that we
20 have had multiple sealing motions. And they often seal the
21 names of people and, you know, that sort of perplexes me, why
22 the name has to be sealed.

23 So I respectfully want to flag that for the Court. We
24 don't see a basis to redact names off the complaint.

25 **THE COURT:** Well, I'm not going to remember that. So

1 you have to say it in your filings about sealing or the point
2 is going to get lost.

3 **MR. BATHAEE:** Thank you, Your Honor.

4 **THE COURT:** You have a mountain of discovery problems.
5 I keep my discovery, which means I'm going to figure out who's
6 an impediment and who is a problem-solver. And problem-solvers
7 will be rewarded and people who are impediments will be
8 sanctioned. I want to be very clear about that.

9 So let me take up -- let's see. This looks like a joint
10 letter, Docket Number 319. Something to do about Facebook's
11 app developer investigation documents and non-party subpoena
12 communications.

13 **MR. SWEDLOW:** Your Honor, I think that's two disputes
14 that we put in that we combined into --

15 **THE COURT:** Let's start with the app developer
16 investigation.

17 **MR. SWEDLOW:** So the app developer investigation
18 documents were -- have been ruled on by two state courts and
19 one federal judge, Judge Corley.

20 The dispute, as we see it, is that the information, the
21 ADI, app developer information, was not the attorney/client
22 communication, but the underlying documents and data from that
23 investigation, is not attorney/client privilege and is not work
24 product, as Judge Corley ruled. And what we would like is that
25 the exact same information that Facebook is required to produce

1 in the exact same form be produced here.

2 THE COURT: All right. Where is -- so there is a
3 bolus of AD -- what do you call it, ADI?

4 MR. SWEDLOW: ADI.

5 THE COURT: So there is a bolus of ADI documents
6 sitting where; what case are they on?

7 MR. SWEDLOW: The Cambridge Analytica case which, I
8 think, Judge Corley was the magistrate judge at the time, and
9 ruled on the discovery dispute in Judge Chhabria's --

10 THE COURT: You know what? Please. The name on the
11 door is "Donato."

12 MR. SWEDLOW: Oh, I'm sorry.

13 THE COURT: Just forget about -- you're here, okay?

14 MR. SWEDLOW: Yes.

15 THE COURT: You're with me now. Don't mention anybody
16 else.

17 MR. SWEDLOW: Got it.

18 THE COURT: I'm asking a very simple question: Where
19 physically are the ADI located? In this MDL case?

20 MR. SWEDLOW: Yes.

21 THE COURT: All right. What is the problem with
22 producing them, Facebook?

23 MS. MEHTA: Yes, Your Honor.

24 So the problem is that the documents that they have
25 requested are not the nonprivileged documents relating to ADI.

1 **THE COURT:** Nonprivileged.

2 **MS. MEHTA:** They're not asking for nonprivileged
3 documents. What they've asked for is a request that is focused
4 only on the documents that Judge Corley ordered to be produced
5 over Meta's objection that they are work product protected.

6 **THE COURT:** Let me ask you this: So have you given
7 your colleagues here, the plaintiffs side, have you given them
8 the non- -- what you consider to be the nonprivileged ADI?

9 **MS. MEHTA:** We have proposed that to them. And they
10 have said they don't want that. What they want is just the
11 cloned production of what is being produced in the Cambridge --
12 and we're happy to talk to them about --

13 **THE COURT:** Let's do this: You produce the ADI
14 documents -- okay? -- whatever you think is nonprivileged and
15 then you're just going to do a privilege log for the other
16 ones. And if you have a problem with the privilege log, you
17 can come and see me. Okay?

18 A problem is not going to be "a judge in Massachusetts" or
19 "one down the hall reached a different decision."

20 That is not a problem. You approach me and say, "This
21 document is not privileged because," as if you're the first
22 person to speak on the issue. You got it?

23 **MR. SWEDLOW:** Understood, yes.

24 **THE COURT:** All right. So just do that.

25 How long do you need for that, Ms. Mehta?

1 **MS. MEHTA:** Your Honor, we're talking about
2 potentially hundreds of thousands of documents. So I'm happy
3 to give you an estimate, but I don't have one off the top of my
4 head.

5 **THE COURT:** They've already been produced; right?

6 **MS. MEHTA:** The problem is they're intermingled with
7 other productions. So it's not like there's no database that I
8 can go to --

9 **THE COURT:** It's not in a little box, so to speak?

10 **MS. MEHTA:** I wish we were talking about boxes of
11 documents, Your Honor. We're talking about data centers.

12 We have -- I understand there's -- I'm not counsel of
13 record in the case, but I understand there is something like
14 five document production databases. And the documents are
15 intermingled throughout, so it wouldn't be like pressing a
16 button. It's going to take us some time.

17 **THE COURT:** How about let's start with three weeks.
18 If you need more time -- okay? So three weeks, you produce the
19 nonprivileged ADI and then a privilege log. If you need more,
20 you can just tell me and work it out with -- preferably, work
21 it out. I don't need to be involved. You can work it out. If
22 you can't work it out, then I'll get involved.

23 **MS. MEHTA:** Thank you, Your Honor.

24 **THE COURT:** All right. So that takes care of that.
25 What's this non-party subpoena issue?

1 **MR. SWEDLOW:** So from our perspective, there are --
2 third-party subpoenas have been issued, and what we were hoping
3 is that we could be copied on the correspondence with
4 third-party subpoenas recipients, receive the productions, and
5 be allowed to attend meet and confers so that we don't have to
6 issue subpoenas and engage in another litigation potentially.

7 **THE COURT:** Okay. That's a little too abstract for
8 me. Who's issuing the subpoenas?

9 **MR. SWEDLOW:** Facebook issued 36 non-party subpoenas
10 in this case.

11 **THE COURT:** Okay.

12 **MR. SWEDLOW:** We've issued a total of 11 so as far.

13 **THE COURT:** Okay. So 36 Facebook subpoenas and what
14 is it -- or Meta subpoenas. What is it you want to know?

15 **MR. SWEDLOW:** We want to be copied on the
16 correspondence with the -- counsel for those third-parties, so
17 that when they engage in a document production and narrow the
18 scope of the subpoena, we don't have to issue our own subpoena
19 to get our own documents from the same party. The parties
20 would be companies like Google and Nielsen.

21 **THE COURT:** Are you having a lot of conversations with
22 people about their production?

23 **MS. MEHTA:** Yes, Your Honor, we are.

24 So here's the concern, and I've said this to them many,
25 many times over the preceding months. We have no problem

1 producing to them our correspondence with non-parties, the
2 documents we get with non-parties; of course, they're entitled
3 to all of that.

4 The problem is, we're having phone calls with non-parties
5 to talk about what we're looking for to develop potential
6 witnesses, to talk about what evidence they may have that may
7 be relevant to our case. Having plaintiffs' counsel on those
8 calls not only infringes on our work product and our ability to
9 develop our case, but I think, frankly, is going to really
10 derail our ability to get non-party discovery, which we're
11 already struggling with because we're already getting a lot of
12 foot-dragging from the non-parties. And I suspect -- I hate to
13 say this, Your Honor, but there's going to be some motions to
14 compel coming your way. We need this evidence --

15 **THE COURT:** Oh, no, no. Discovery letters. No
16 motions.

17 **MS. MEHTA:** That's what I mean, Your Honor. I'm
18 sorry.

19 **THE COURT:** Please, always keep that in mind; just the
20 letters, please.

21 **MS. MEHTA:** And that having plaintiffs on every call
22 so that we're having a three-way negotiation or litigation
23 about the scope of the subpoenas is going to take this process
24 and blow it up way further.

25 **THE COURT:** Well, strictly speaking, you shouldn't be

1 having conversations with witnesses about what they're going to
2 do. They're supposed to be producing --

3 **MS. MEHTA:** Not the witnesses, counsel -- about who
4 might be knowledgeable about what documents they might have
5 that might be relevant. This is the normal negotiation process
6 with counsel for a non-party.

7 I guarantee you that if a non-party was on the phone with
8 me or one of my colleagues, and then a plaintiff's lawyer, and
9 had to listen to us argue about what's relevant and not
10 relevant and what should come in and what shouldn't come in,
11 the process is going to fundamentally break down.

12 **THE COURT:** Well, I think they have a right to know if
13 you're skewing the evidence. That's what he's asking.

14 **MS. MEHTA:** But that --

15 **THE COURT:** And I have to say I'm a little concerned.
16 I mean, these are non-parties, meaning they're witnesses, and
17 you should not be bargaining with them about what's good for
18 you and what's not good and whether they should produce it or
19 not.

20 **MS. MEHTA:** Well, but -- Your Honor, that's not what
21 we're doing.

22 So I want to be very clear. That's not what we're doing.
23 What we're doing is talking about the scope of the information
24 that we're asking for. "Here is what we're interested in
25 trying to learn about. Do you have documents about that?" And

1 the non-party might say, "No, we don't keep documents about
2 that, but we have documents about this other thing."

3 That's a free-flowing conversation.

4 **THE COURT:** No, I understand you may say that. And
5 everybody here is entitled to trust but verify, and you are
6 taking out the "verify" part.

7 I'll just tell you as a general rule, I am not at all
8 sanguine about lawyers cutting deals with witnesses on what,
9 you know, they may have or not. That gives me considerable
10 pause, Ms. Mehta. So I don't know what the answer is, but --

11 **MS. MEHTA:** Could I make a suggestion, Your Honor?

12 **THE COURT:** -- I don't like the position you're
13 taking.

14 **MS. MEHTA:** Could I make a suggestion, Your Honor?
15 Because I want to be very clear, we're not -- I'm sorry.

16 We're not cutting deals, but we're getting very strong
17 objections from non-parties as to the scope of the subpoena and
18 then we're doing what you do in every instance where you have a
19 negotiation: We're making agreements to narrow in some places
20 and focus in places that are higher priority for us.

21 We have no problem sharing with the plaintiffs what we're
22 narrowing. We will tell them -- we'll send them an e-mail and
23 say "We just narrowed the following topics, and we've told them
24 that we're not going to ask for X, Y, Z." And if they want X,
25 Y, and Z, they can talk to those non-parties and get it.

1 **THE COURT:** Well, that seems fair. Let's do it that
2 way. That should be enough.

3 **MR. SWEDLOW:** If I could -- just one point here.
4 What we're hoping for is to avoid then having to, after
5 the fact, go back to Apple, Google, Twitter and say, "If you
6 had just looked for that category, then we don't have to issue
7 or enforce our subpoena." It's not --

8 **THE COURT:** You might have to do that.
9 So that's -- but, Ms. Mehta, you're going to send to the
10 plaintiffs every conversation and deal you strike.

11 **MS. MEHTA:** Yes, Your Honor.

12 **THE COURT:** This is going to be aboveboard. This is
13 going to be discovery in the sunshine. I'm not going to
14 have --

15 **MS. MEHTA:** We're happy to do that.

16 **THE COURT:** -- any backroom deals that the other
17 side -- and that goes -- both sides. This works two ways; this
18 is bilateral. This isn't just Ms. Mehta. I'm just talking to
19 you too on the plaintiffs' side. You're all going to do this
20 out in the public square, so to speak, and everyone is going to
21 see it. So make sure that happens.

22 **MS. MEHTA:** Your Honor, just one logistics point.

23 I would like to suggest that we agree to a weekly schedule
24 by which the parties inform each other of any adjustments or
25 narrowing of the subpoenas.

1 **THE COURT:** Do a Friday check-in, how about that?

2 **MS. MEHTA:** That sounds great.

3 **THE COURT:** So a weekly Friday check-in.

4 **MS. MEHTA:** We'll e-mail each other on Friday with
5 that --

6 **THE COURT:** You two can work it out.

7 That resolves Docket Number 319.

8 Now, Docket Number 323-3, which is sealed again for some
9 reason, but anyway: Hyperlinked Documents.

10 What's the hyperlinked documents issue? Plaintiff?

11 **MR. DUNNE:** Yes, Your Honor. Brian Dunne for the
12 advertisers.

13 So, Your Honor, the dispute here is essentially that we
14 have this giant amount of documents where the centerpiece of
15 the conversation is missing. And I think the real problem,
16 just going through practicalities, is that we haven't been
17 presented by -- anything by Meta that would allow us to
18 actually ensure what when we have all of these documents that
19 are saying, "Hey, look at this -- look at this -- read through
20 about what you're going to be doing," or "look at this
21 competitive analysis of Netflix," we have an ability to see
22 that.

23 And so, you know, what we would like is, an order from
24 Your Honor saying, at minimum, when -- right? -- that
25 advertisers, can send or, I guess, plaintiffs generally can

1 send a list of hyperlinks of relevance that Meta will then --

2 **THE COURT:** All right. You just want to pick some
3 links here and there? Is that what you're saying?

4 **MR. DUNNE:** What I would recommend -- which I've seen
5 in other cases -- is, we will just send them lists on a rolling
6 basis --

7 **THE COURT:** Okay.

8 **MR. DUNNE:** -- and they send back to us the documents.

9 **THE COURT:** My point is, though, you're going to --
10 this is a curated list. You're not just going to say --

11 **MR. DUNNE:** It's a curated list. Yes, so it will
12 be --

13 **THE COURT:** You will actually pick a subset.

14 **MR. DUNNE:** Right. So it will say, you know, my
15 colleague or whatever, Mr. -- my friend --

16 **THE COURT:** All of them, every time.

17 **MR. DUNNE:** Mr. Gringer -- "David, I have these lists
18 that advertisers noticed from our document review that we need
19 to find the hyperlinks from." Right?

20 And some sort of -- right? -- reasonable time period,
21 perhaps like 10 days or so, where we're supposed to get back to
22 us. And then we can work out -- right? -- they say that they
23 have trouble -- right? -- locating -- or doing -- doing like
24 linkages, or maybe things are missing. Well, they can tell us
25 that when we send it to them.

1 **THE COURT:** All right. That seems reasonable.

2 **MR. GRINGER:** Good afternoon, Your Honor. David
3 Gringer for Meta.

4 I agree it seems reasonable; so reasonable we've been
5 proposing it to the advertiser plaintiffs for the last
6 six months. So as long as it's reasonable, if that's how they
7 want to proceed --

8 **THE COURT:** If it gets too much, you can come back and
9 tell me. Okay? We'll do that on that basis.

10 All right. That resolves 323-3.

11 All right. Now, 328. Hot off the press, August 4th.
12 Well, not that hot. A week ago. Let's see.

13 Oh. This is the hyperlink. That's fine. We're done.
14 Okay. So -- all right. The discovery problems are solved.

15 Now, I always regret asking this: Is there anything else,
16 Ms. Mehta?

17 **MS. MEHTA:** Your Honor, what I would suggest is that
18 we take heed of Your Honor's warning that we need to move this
19 case forward with discovery and that you're not going to abide
20 discovery impediments, and see if we can't get the parties to
21 work together on a whole host of other issues that we raised in
22 our joint case management statements.

23 I don't want to take your time with them now. I'm hoping
24 your comments will help get us moving.

25 **THE COURT:** Good. I'll give you this opportunity -- I

1 do it rarely, but this may be a case where it's suitable -- I'm
2 happy to have quarterly check-ins with me, if you'd like to do
3 that. We set it every quarter, and if you don't want to do it
4 you can just say "We don't need to," and we'll just take it off
5 calendar, that's not a problem, if you are -- if everybody is
6 happy.

7 Do you want to do that?

8 **MS. MEHTA:** Yes, Your Honor. You know, I know it's
9 rare for the defendant to be asking for that, but in this case,
10 I think we could actually really use that --

11 **THE COURT:** No, defendants ask all the time.

12 **MS. MEHTA:** We need to move this forward and we need
13 to move it forward effectively and officially, and I think that
14 would help.

15 **THE COURT:** Why don't we schedule the first one for --
16 when would you like to schedule the first one, Ms. Mehta?

17 **MS. MEHTA:** I think, Your Honor -- it's August right
18 now. Maybe in October, towards the middle or end of October,
19 if Your Honor is available.

20 **THE COURT:** All right. You two work out a date.
21 We'll keep it quarterly, more or less. If you don't want to do
22 it, just tell me a week ahead of time. It's not a problem. No
23 questions asked. We'll cancel it. But if there are things
24 that come up -- now, let me tell you how this has gone off the
25 tracks in other cases: People get used to it and then they

1 just sort of walk in and present things to me without any prior
2 notice of what the situation is or anything else. Let's don't
3 do that. Okay? I'm happy to shoot from the hip, but you're
4 going to regret it afterwards. So just, if you have something
5 for me to do, a week before, you put it in your statement.

6 Now, look, I don't need the full this is -- whatever is on
7 deck for that meeting, I don't need the whole joint case
8 management thing. So don't do that. Give yourselves a break.
9 Just tell me, "Here are the three issues we're having a problem
10 on," and I'll take it from there. Okay?

11 **MS. MEHTA:** Understood, Your Honor. Thank you.

12 **THE COURT:** Okay.

13 What are you doing to resolve this, informally?

14 Ms. Mehta?

15 **MS. MEHTA:** Yes, Your Honor. I knew you'd ask me that
16 question.

17 So the answer is: Nothing yet.

18 But I have to say the reason for that. We are always open
19 to talking about settlement, but this is a little bit of an
20 unusual case given the breadth of the allegations, the nature
21 of the allegations -- which are pretty novel, both with respect
22 to the users and with respect to the advertisers. And I think,
23 you know, my assessment is, given the numbers they've said in
24 their initial disclosures for what they think is at stake,
25 given the issues in the pleadings that if we were to try to

1 engage now, it might be too early to actually have a
2 constructive discussion.

3 **THE COURT:** Have you picked anybody?

4 **MS. MEHTA:** We have not, and we're happy to work on
5 that with them.

6 **THE COURT:** Why don't you select someone and have that
7 person ready to go. You two know what to do, but -- I mean,
8 there are a number of national figures, you know, all sorts of
9 people who are available and may be useful.

10 To some extent, your life, I think, has been made easier,
11 Ms. Mehta, because as I understand it, the plaintiff
12 advertisers are just saying it's just 2015 to 2019; that's it,
13 more or less. So at least you know the years. I don't know
14 how much is within those years.

15 But anyway, why don't you get that done. So within
16 two weeks, just file a designation of who you have selected to
17 be -- for everything, okay? This will be the global dispute
18 mediator, settlement mediator for everybody.

19 I'm happy to consider a magistrate judge. This is a case
20 that I think might profit from it. But I'd leave it to you in
21 the first instance to decide. And if you prefer to have a
22 magistrate judge, you can just file in two weeks a request for
23 that and I will get somebody lined up. But if you want to do
24 someone else, you two talk about it first and work it out.
25 Okay?

1 **MS. MEHTA:** Just one question about that, Your Honor.

2 In the past, where we have requested a magistrate judge --
3 and different district judges have done this in different ways,
4 so I wanted to ask your preference. Would you like us to
5 confer on particular magistrates that we think would be well
6 suited --

7 **THE COURT:** I always like to have a name that people
8 are comfortable with. I want everyone to be comfortable. So I
9 want you to pick your judge. So if you have somebody in mind,
10 I'd be perfectly happy to consider it. I can't guarantee it
11 for a variety of reasons, but I will do everything I can to
12 honor the request. Sound good?

13 **MS. MEHTA:** Thank you.

14 **MR. SWEDLOW:** Your Honor, I just wanted to flag one
15 issue so that it doesn't just come up for the first time in
16 October.

17 We believe that the case schedule could -- we may not be
18 able to meet it as litigants unless there's some date that is
19 imposed, a substantial completion date that's imposed.

20 The *FTC* case -- which is not the same case, but is against
21 Facebook also -- recently had a substantial completion date for
22 document production. If we don't have that date imposed upon
23 Facebook, and for the plaintiffs, then we won't be able to
24 proceed to depositions because we won't know that we have the
25 documents we need to conduct a deposition.

1 **THE COURT:** Well, you two can talk about that. And if
2 it's a problem and you don't want to wait until October, you
3 can do a joint statement to me and I can take care of it that
4 way.

5 **MR. SWEDLOW:** Okay.

6 **THE COURT:** All right. Thanks for coming in.

7 **MS. MEHTA:** Thank you, Your Honor.

8 (Proceedings adjourned at 12:44 p.m.)

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10 **CERTIFICATE OF REPORTER**

11 I certify that the foregoing is a correct transcript
12 from the record of proceedings in the above-entitled matter.

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14 DATE: Sunday, August 14, 2022

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19 _____
20 Ruth Levine Ekhaus, RMR, RDR, FCRR, CSR No. 12219
21 Official Reporter, U.S. District Court
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